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Supreme Court of the United States

October Term, 1929.

Nos. ~~12~~ and ~~13~~
12 + 13

O'GORMAN AND YOUNG, INCORPORATED,
Appellant,

vs.

HARTFORD FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT,
Appellee.

O'GORMAN AND YOUNG, INCORPORATED,
Appellant,

vs.

PHOENIX ASSURANCE COMPANY, LTD., LONDON,
Appellee.

APPEALS FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

BRIEF FOR APPELLANT

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Supreme Court of the United States

OCTOBER TERM, 1929.

O'GORMAN AND YOUNG, INCORPORATED, Appellant, vs. HARTFORD FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Appellee.	No. 458
O'GORMAN AND YOUNG, INCORPORATED, Appellant, vs. PHOENIX ASSURANCE COMPANY, LTD., LONDON, Appellee.	No. 459

ON APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

BRIEF FOR APPELLANT.

The Opinion of the Court Below.

The above-entitled cases are before this court on appeals from the Court of Errors and Appeals of the State of New Jersey. They were considered together in both of the courts below and the Court of Errors and Appeals of the State of New Jersey, by a divided court of 8 to 6,

affirmed the judgments on the opinion of the Circuit Court of Essex County. This opinion appears in the record (pp. 25-28) but has not been officially reported. It will be found in the New Jersey Advance Reports, Vol. VII, page 980, and in 146 Atlantic Reporter 370.

The final order and judgment in each case were entered on August 25, 1929 (R. 10, 32). The proper papers for the allowance of the appeals to this court were presented on October 16, 1929, to Honorable E. R. Walker, Chancellor and President Judge of the Court of Errors and Appeals, who denied the application (R. 15, 36), but the appeals were allowed by order of Mr. Justice Brandeis on October 18th (R. 15-16, 36-37).

Each suit was brought on October 29, 1928 (R. 3, 19), by O'Gorman & Young, Inc., a New Jersey corporation, with its principal place of business in Newark, New Jersey, operating as a fire insurance agent for the respective defendants, and each suit is in contract to recover balance due from the insurance company for services rendered in negotiating insurance policies. In each suit the sole alleged defense is a statute of the State of New Jersey, effective March 29, 1928, and in each case the constitutionality of the statute was attacked by the appellant on a motion to strike out the separate defense in the answer which set it forth and in each suit the statute was upheld and operated as a bar to recovery.

Summary of Pleadings in Hartford Fire Insurance Company Case.

Complaint.

Par. 1. Plaintiff, an insurance broker regularly licensed under the laws of the State of New Jersey, has been prior to and since March 29, 1928, and now is a duly commissioned agent of the Hartford Fire Insurance Company, a Connecticut corporation, which is authorized to transact the business of fire insurance in the State of New Jersey (R. 1).

Par. 2. Plaintiff, for many years past, has been in the employ of said company as its agent in the State of New Jersey for the purpose of negotiating and selling fire insurance policies to be issued by defendant to persons and upon property located in said state, and especially in the City of Newark and County of Essex; "pursuant to the terms of said employment and prior to March 29th, 1928, the defendant agreed to and did pay the plaintiff for *services* as such agent a commission of twenty-five per centum on each premium charged" (R. 1).

Pars. 3-4. On March 29, 1928, or subsequently thereto, the defendant renewed said contract of employment and agreed to pay the plaintiff *what such services were reasonably worth; and same were reasonably worth the rate of commission* theretofore paid to the plaintiff by said defendant. Since March 29, 1928, and the renewal of said contract, plaintiff has produced premiums amounting to $2,454.61, thereby earning a 25 per cent. commission, amounting to $613.68. Defendant has paid plaintiff a commission of 20 per cent., amounting to the sum of $490.92, but refuses to pay the balance of $122.76 which is due and owing, and for which the plaintiff demands judgment (R. 1-2).

Answer.

The answer admits all of the allegations of the complaint, except "defendant denies that it owes the plaintiff the sum of $122.76 as in said complaint alleged for the reasons hereinafter in this answer set forth" (R. 4). Then follows a first separate defense, setting forth Chapter 128 of the Laws of 1928 of the State of New Jersey, approved March 29, 1928,* as follows:

> "In order that rates for insurance against the hazards of fire shall be reasonable it shall be unlawful for any such insurer licensed in this State to directly or indirectly pay or allow, or offer to

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* The entire statute is printed in our appendix.

agree to allow, *any commission or other compensation* or anything of value, *in excess of a reasonable amount*, to any person for acting as its agent in respect to any class of such insurance, nor to directly or indirectly pay or allow, or offer or agree to allow, *any commission or other compensation* or anything of value, to any person for acting as its local agent in respect to any class of such insurance, *in excess of that offered*, paid or allowed *to any one of its local agents* on such risks in this State.

"Any insurer, agent, expert, person or corporation violating any of the provisions of this act shall be subject to a penalty of five hundred dollars for each and every violation to be sued for and recovered by the Commissioner of Banking and Insurance, or by any citizen of this State and paid to the State Treasurer. In case any insurer is convicted of a violation of this act, every local agent of the insurer in this State shall be entitled to the same commission or compensation, or other thing of value, for business done for the insurer during the calendar year in which the discrimination took place, on risks in this State, and *any local agent may recover from the insurer in any court of competent jurisdiction, the amount of such excess commission or compensation*, or other thing of value, if any, to which he may become entitled under the provision of this Act" (R. 4-5).

The answer then alleges that on and after March 29, 1928, the defendant had several persons acting as its local agents in writing fire insurance in the State of New Jersey to whom it allowed a 20 per cent. commission, and that, pursuant to the terms of the aforesaid statute, it was unlawful to pay the plaintiff the commission of 25 per cent. theretofore paid by the defendant to the plaintiff (R. 5).

Summary of Pleadings in Phoenix Assurance Co., Ltd. Case.

COMPLAINT.

Par. 1. Allegations are the same as in the Hartford Fire Insurance Company suit (R. 16).

Par. 2. Plaintiff has had, for many years, a legal and subsisting employment contract with defendant to act as its agent in selling fire insurance policies to be issued by defendant to persons and upon property located in said state, and especially in the City of Newark and County of Essex, upon stated rates of commission, which contract was, on March 29, 1928, in full force and effect (R. 16).

Par. 3. Since March 29, 1928, plaintiff has produced premiums and fire insurance contracts for the defendant in the aggregate amount of $4,111.67. The total commissions earned by plaintiff in negotiating said contracts pursuant to its contract of agency amounts to $1,027.92. Defendant, notwithstanding its contract, refuses to pay the plaintiff a commission greater than 20 per cent., or the sum of $822.34, leaving a balance due plaintiff for acting as agent of the defendant, in accordance with its said contract, in the amount of $205.58 (R. 16-17).

Par. 4. By reason of defendant's refusal to perform its agreement to pay the plaintiff 25 per cent., and its refusal since March 29, 1928, to observe its employment contract, plaintiff has suffered damages not only because of the reduced commissions, but because it has been put to great expense and loss in the conduct of its business (R. 17).

Plaintiff, therefore, demands damages in the sum of $1,000 (R. 18).

ANSWER.

The general allegations of the answer are identical with those in the case of the Hartford Fire Insurance Company, except that the allegations of paragraph 4, in respect to damages, are also denied. The answer admits the allegations of the complaint as to the existing contract of employment as well as the amount due by virtue thereof and sets forth the New Jersey statute as a defense (R. 20-21).

Identical Proceedings in Both Cases.

On November 10, 1928, a motion was filed in each case to strike out the answer on the grounds, among others, that the statute set forth in the first separate defense was null and void because

> (a) Said act is in violation of Article I, Section 10, paragraph 1 of the Constitution of the United States, forbidding any state to pass any law impairing the obligation of contracts;
>
> (b) Said act is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, forbidding any state to deprive any person of life, liberty or property without due process of law, or to deny any person within its jurisdiction equal protection of the laws (R. 5-6, 22-23).

On December 19, 1928, an order was entered in each of said cases (R. 8, 24), denying said motion to strike out, reciting that it had been admitted in open court that the defendant paid a 20 per cent. commission to some of its agents in the State of New Jersey, and ordering a final judgment in favor of the defendant (R. 8, 24). An appeal was thereupon taken in December, 1928, to the Court of Errors and Appeals in both cases, specifying as grounds for appeal the same claims as specified on the motion to strike out (R. 9-10, 29-30).

The Court of Errors and Appeals, adopting the opinion of the Circuit Court (R. 30), affirmed the judgment below in each case (R. 10, 32).

The opinion of the Circuit Court (R. 25-28), so far as it relates to the point now being urged as to the invalidity of the statute, declares that the fire insurance business being affected with a public interest is subject to reasonable regulation and that the question of reasonableness is to be decided "sometimes by the Court and sometimes by a jury"; that the statute is valid and reasonable because it merely requires reasonable commissions which influence the rates of insurance; that since 20 per cent. is the amount paid to some of the local agents, the effect of the statute is to declare that any excess is unreasonable; that the presumption is in favor of the reasonableness of the statute, and nothing has been shown to overcome that presumption.

We submit that the state court opinion does not fully set forth the significance of the statute in question. The statute provides that in order that fire insurance rates shall be reasonable, it shall be unlawful for any fire insurance company licensed in the state

> (a) to pay any agent compensation in excess of a reasonable amount, or
>
> (b) to pay any agent compensation in excess of that paid to any one of its local agents.

The provision limiting compensation to a reasonable amount might well require a judicial determination in the case of each agent to fix what is reasonable compensation before a company could safely make payment. The uniformity provision, coupled with the provision that compensation in no case shall be "in excess of a reasonable amount," requires that the value of the services of the least valuable agent must be the maximum of compensation for all agents.

The second paragraph of said act gives every local agent, in case the insurer is convicted of violating said act,

the right to recover an amount equal to the excess compensation paid to other agents. A strange contradiction is this. To promote reasonable insurance rates, the insurer is forbidden to pay any agent in excess of the amount paid by it to any other agent, but once the statute is violated and a conviction secured, every agent by civil suit may recover that excess, which it was unlawful voluntarily to pay. Thus what the statute forbids in one provision, it directs in another.

In No. 458, the case of the Hartford Fire Insurance Company, the statute operated as a bar to the recovery of the reasonable value of the services rendered because some other insurance agent of that company was in receipt of less compensation.

In No. 459, the case of the Phoenix Assurance Company, the statute operated as a bar to the recovery of the agreed and contract value of the services rendered because some other insurance agent of that company was in receipt of less compensation.

The statute in its effect destroys alike the right of the company to pay and the right of the agent to receive a reasonable amount or an amount mutually agreed upon, for the compulsion of the penal provisions prevents the company, and in these cases did prevent the company, from compensating its agents except in conformity with the statutory restrictions.

The vast volume of insurance legislation throughout the United States is characterized by the absence of statutory provisions of this character. Outside of Act No. 302 of the Louisiana Laws of 1926 and Chapter 188 of the Mississippi Laws of 1924, no similar legislation has come to our attention.

Assigned Error.

The assigned error urged on this appeal is the failure of the state court to hold the statute void because in violation of the Fourteenth Amendment. While the statute, in terms, is aimed at the employer, it is being given effect to the injury of the agent, who is, therefore, in a position to challenge its validity (*Truax* v. *Raich*, 239 U. S. 33).

These cases therefore clearly present the question as to the constitutionality of this unusual statute which regulates the amount of remuneration to be paid by fire insurance companies to insurance agents in the State of New Jersey. It is not a regulation of the relation of the insurance company to the public but regulation of one of the internal details of private management.

With *Wilson* v. *New*, 243 U. S. 332, as our guide, we approach our assigned error by dealing, first, with the question of constitutional power to regulate the amount of compensation to be paid insurance agents, and secondly, by urging that, if any such power exists, there is in this case such an arbitrary exercise thereof as to render the statute unconstitutional.

POINT I.

The Legislature of the State of New Jersey has no power to regulate the amount of compensation to be paid fire insurance agents.

It must be conceded that the business of fire insurance is affected with the public interest to such an extent that insurance rates may be regulated (*German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389). This decision, however, "marks the extreme limit to which this court thus far has gone in sustaining price-fixing legislation."

Tyson & Bro. v. *Banton*, 273 U. S. 418, 434.

Agents of fire insurance companies are likewise subject to regulation for the purpose of securing trustworthy agents to deal with the public.

> *La Tourrete* v. *Fitz Hugh McMaster*, 248 U. S. 465.

But the mere fact that a business is classified as one affected with a public interest does not determine the degree of regulation to which it shall be subjected (*Wolff Packing Co.* v. *Industrial Court*, 262 U. S. 522).

It therefore becomes necessary to examine at some length the general principles underlying the problem presented.

A radical and apparently arbitrary infringement of liberty and private management calls for justification.

Private business cannot be so restricted, as in the case at bar, "unless justified as a valid exercise of the police power" (*Liggett Co.* v. *Baldridge*, 278 U. S. 105, 111).

> "But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."
>
> *Adkins* v. *Children's Hospital*, 261 U. S. 525.

See also:

> *Wolff Packing Co.* v. *Industrial Court*, 262 U. S. 522, 534; 267 U. S. 552, 566.

The fundamental nature of the rights involved and their sanctity from arbitrary restriction has been made clear in many decisions. The very purpose of the Constitution was "to prevent experimentation with the fundamental rights of the individual" (*Truax* v. *Corrigan*, 257 U. S. 312, 338).

> "That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause, is settled by the decisions of this court

> and is no longer open to question (citing cases). Within this liberty are contracts of employment of labor. In making such contracts, generally speaking, the parties have an equal right to obtain from each other the best terms they can as the result of private bargaining."
>
> *Adkins* v. *Children's Hospital, supra,* at p. 545.

> "The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of a purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it.
>
> * * * * * *
>
> In all such particulars the employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty to contract, which no government can legally justify in a free land."
>
> *Adair* v. *U. S.,* 208 U. S. 161, 174-175.

See also:

> *Coppage* v. *U. S.,* 236 U. S. 1, p. 14.
> *Meyer* v. *Nebraska,* 262 U. S. 390, 400.

It has now been thoroughly settled by this court that the right to regulate by requiring licenses, etc., does not necessarily carry with it the power to indulge in price or wage regulation:

> "The latter power is not only a more definite and serious invasion of the rights of property and the freedom to contract, but its exercise cannot always be justified by circumstances which have been held to justify legislative regulation of the manner in which a business shall be carried on."
>
> *Tyson Bro.* v. *Banton,* 273 U. S. 418, 431.

See also:

> *Ribnik* v. *McBride,* 277 U. S. 350.
> *German Alliance Insurance Co.* v. *Lewis* (*supra*).

This review of fundamental principles demonstrates that price fixing or wage fixing destroys the very heart of freedom of contract and cannot be sustained except under extraordinary and exceptional circumstances. The burden of proving the facts to justify such a law rests, as we understand it, upon those who urge its validity.

Proceeding from the general to the specific, we will now discuss three distinct lines of authorities sustaining the following propositions:

A. The Legislature is without power to prohibit private contracts as to the amount of compensation to be paid by employers to their adult employees.

B. The power to regulate rates to be charged the public does not imply power to invade the field of private management.

C. The New Jersey statute is arbitrary and unnecessary, because the declared purpose of promoting reasonable insurance rates can be accomplished by the simple and direct means of rate regulation, and is not in fact promoted by regulating the compensation of insurance agents.

A.

The Legislature is without power to prohibit private contracts as to the amount of compensation to be paid by employers to their adult employees.

There are seven leading cases in which this court has discussed at length the legislative power to regulate the amount of compensation for personal services. They are as follows:

Wilson v. *New*, 243 U. S. 332 (1917).
Adkins v. *Children's Hospital*, 261 U. S. 525 (1923).
Wolff Packing Co. v. *Industrial Court*, 262 U. S. 522 (1923).

Wolff Packing Co. v. *Industrial Court*, 267 U. S. 552 (1925).
Tyson & Bro. v. *Banton*, 273 U. S. 418 (1927).
Ribnik v. *McBride*, 277 U. S. 350 (1928).
Tagg Bros. & Moorhead v. *U. S.*, 280 U. S. .... (1930).

Curiously enough, the first four of these cases are concerned with internal and private contracts between employers and employees, while the last three concern external contracts to render services to the public. In the first class of cases, dealing with internal contracts, all legislative power, to inhibit private contracts as to the amount of compensation to be paid for personal services, is denied. In the second class of cases, where the court is considering contracts with the public, the question of legislative power, as in the case of regulating insurance rates, depends upon whether or not the business is impressed with the public interest.

No case brought before this court upholds any statute which seeks to substitute, as between employer and employee, a legislative rate of wage for a conventional rate or the right to arrive at a conventional rate. Wherever this court has dealt with this subject it has asserted the liberty of an individual to enter into service contracts for compensation agreed upon.

In the case of *Wilson* v. *New* (*supra*), this court had before it an Act of Congress enacted in the face of a threatened railroad strike which temporarily fixed wages and hours of railroad employees as a means of avoiding a nation-wide paralysis of transportation. The validity of the statute was sustained solely on the ground that it was necessary temporarily to establish a legislative standard of wage because of the *non-agreement* of the parties, in order thereby to protect the public from the calamity of a railroad strike. In reaching such a conclusion, the prevailing opinion asserted an entire want of power in Congress to interfere with rates of wages which might be

agreed upon between carriers and their employees. Mr. Chief Justice White, in the prevailing opinion (p. 347), declared:

> "It is also equally true that as the right to fix by agreement between the carrier and its employees a standard of wages to control their relations is primarily private, the establishment and giving effect to such agreed on standard is not subject to be controlled or prevented by public authority."

Mr. Justice Pitney, in his dissenting opinion, concurred in by Mr. Justice Van Devanter, speaks the same doctrine (p. 381):

> "The employment is a matter of private bargaining between the parties, in which each has a constitutional right to exact such terms as he may deem proper (citing cases). Thus the sole foundation of the governmental power to fix rates is absent in the case of wages, and the asserted power to fix the latter is inconsistent with the constitutional rights of the employer and employee to agree between themselves respecting the terms of the employment."

It appears from an examination of all of the opinions in that case that there was far greater unanimity on this point than upon the question of the validity of the statute. Compulsory arbitration, or the substitution of a legislative standard, where parties are unable to agree, is one thing, but legislation to destroy the right to agree is quite another.

In the case at bar it may be said as was said by Mr. Justice Sutherland in *Adkins* v. *Children's Hospital* (p. 551), "Here they are forbidden to agree."

In *Wilson* v. *New*, the court expressly disclaimed any intention to uphold interference with the right of the railroads and their employees to make their own agreements. Upon this point it said, at page 357:

> "It certainly cannot be said that the act took away from the parties, employers and employees,

> their private right to contract on the subject of a scale of wages since the power which the act exerted was only exercised because of the failure of the parties to agree and the resulting necessity for the lawmaking will to supply the standard rendered necessary by such failure of the parties to exercise their private right."

At page 345 the court commented on the limited nature of the restrictions as follows:

> "It is therefore not permanent but temporary, leaving the employers and employees free as to the subject of wages to govern their relations by their own agreements after the specified time."

It was made clear throughout the opinion that the legislation sought only to protect the public from the national calamity of a railroad strike by filling the void left by the failure of the parties to exercise their private right of reaching an agreement (pp. 347-350). Their private right to reach an agreement without interference was not denied, but repeatedly asserted.

This court has made clear, in more than one later decision, that the case of *Wilson* v. *New*, like the emergency rent cases, involved merely temporary regulation to meet an emergency, and that furthermore all of these cases went to the very verge of the law. In the case of *Tyson & Bro.* v. *Banton*, 273 U. S. 418, at page 437, this court said:

> "*Wilson* v. *New*, 243 U. S. 332 (involving the Adamson law), *Block* v. *Hirsh*, 256 U. S. 135, and *Marcus Brown Co.* v. *Feldman*, 256 U. S. 170 (the rental cases), are relied upon to sustain the statute now under review. But in these cases the statutes involved were of a temporary character, to tide over grave emergencies. *Adkins* v. *Children's Hospital*, 261 U. S. 525, 551-552, the emergency in the New case being of nation-wide extent; and it is clear that, in the opinion of this court, at least the business of renting houses and apartments is not so affected with a public interest as to justify legislative fixing of prices unless some great emergency exists. *Block* v. *Hirsh*, supra, p. 157; *Chastleton Corp.* v.

> *Sinclair*, 264 U. S. 543, 548. And even with the emergency, the statutes 'went to the verge of the law.' *Penna. Coal Co.* v. *Mahon*, 260 U. S. 392, 416."

See also *Adkins* v. *Children's Hospital*, 261 U. S. 525, p. 552.

In the case of *Wolff Packing Co.* v. *Industrial Court*, 262 U. S. 522, this court, at page 544, said:

> "It is not too much to say that the ruling in *Wilson* v. *New* went to the border line, although it concerned an interstate common carrier in the presence of a nation-wide emergency and the possibility of great disaster."

In the case of *Plummer* v. *R. R.*, 31 F. (2d) 123, 124, the district court, in referring to *Wilson* v. *New*, said:

> "Had the statute attempted to fix permanently the wages of employees undoubtedly the Supreme Court would have held it unconstitutional."

Thus the prevailing opinion of this court in the case of *Wilson* v. *New*, as well as one of the dissenting opinions, uphold the contention that there is no power in state or federal legislature to substitute a legislative standard of wages or remuneration for those agreed upon between employer and employee even in an occupation affected with a public interest. If such be the law in respect to railroads whose importance to the public has greater acknowledgment than in the case of fire insurance, and, therefore, justifies a stricter degree of regulation (*Wolff Packing Co.* v. *Industrial Court*, *supra*), then the same proposition must be equally true as applied to the case at bar. Here the parties have agreed on a rate of compensation, which in this particular instance happens to be in the form of a commission, or piece rate wage, but the State of New Jersey undertakes to destroy the agreed basis upon which the parties desire to do business and to substitute a legislative contract not of the parties' choosing. Both insurer

and its agent are prevented from doing business on a basis mutually acceptable.

The second case decided by this court, involving the validity of a statute which regulated the amount of wages, is that of *Adkins* v. *Children's Hospital*, 261 U. S. 525. In that case the court held unconstitutional, as applied to women, an act of the District of Columbia providing for a board which was given power to fix wages to be paid women and minors, because, as stated by Mr. Justice Sutherland, it went beyond the regulation of hours or the manner of paying wages or conditions of employment having to do with health and morals and set up a permanent wage-fixing body, thereby destroying the right to contract.

The same year, but a few months later, this court decided the case of *Wolff Packing Co.* v. *Industrial Court*, 262 U. S. 522, involving a statute of the State of Kansas which created an industrial court with power in emergencies to fix the wages and hours in specified industries. The act was applicable to (1) the manufacture and preparation of food; (2) the manufacture of clothing; (3) the production of fuels; (4) transportation, and (5) public utilities and common carriers, and it declared each of these to be affected with public interest. This court held the act to be void in so far as applicable to food preparation.

The case is particularly notable for its definition of three classes of businesses affected with public interest: (1) those carried on under public grant which involve the affirmative duty to serve the public, such as railroads, common carriers and public utilities; (2) certain occupations which historically have been regarded as affected with a public interest, such as keepers of inns, cabs and grist mills; (3) businesses which, though not public, at their inception may be fairly said to have risen to such a status.

The decision of *German Alliance Insurance Co.* v. *Lewis* (*supra*) had already brought the business of fire insurance within the third classification, and one of the ques-

tions before the court in the *Wolff Packing Co.* case, 262 U. S. 522, was whether preparation of food also came within the same classification as a business affected with a public interest. This court, in an unanimous opinion after discussing that question, said (p. 539):

> "We are relieved from considering and deciding definitely whether preparation of food should be put in the third class of quasi-public business, noted above, because even so, the valid regulation to which it might be subjected as such, could not include what this act attempts."

As we read this statement it clearly means that any business within class three of the businesses affected with a public interest cannot be lawfully regulated as to the amount of compensation paid to agents, employees and servants. If it be true that the business of preparing food, even assuming it be affected with a public interest, cannot be made the subject of wage regulation even for the purpose of avoiding public emergencies through strikes, then it would seem to be equally true that the business of fire insurance, conceded to be affected with a public interest, cannot be subjected to a law which denies a company the right privately to agree with its agents on the amount of their compensation.

After denying the existence of power to so regulate, this court, in the *Wolff Packing Co.* case, proceeded to emphasize the fact that the degree of regulation to which a business might be subjected is not entirely determined by classifying it as a business affected with a public interest. Businesses affected with a public interest are of different classes, permitting of different degrees of regulation depending upon the public interest. The degree of regulation to which railroads might be subjected therefore might be greater than the degree of regulation to which the fire insurance business could be subjected. Upon this point, the court said (p. 539):

> "To say that a business is clothed with a public interest, is not to determine what regulation may

> be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business. *The regulation of rates to avoid monopoly is one thing. The regulation of wages is another.* A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation."

The Kansas Industrial Court Act again came before this court for decision in the case of *Wolff Packing Co.* v. *Industrial Court*, 267 U. S. 552, and Mr. Justice Van Devanter, rendering the opinion of the court, reaffirmed the previous decision and said (p. 567):

> "The court recognized that, in a sense, all business is of some concern to the public and subject to some measure of regulation, but made it plain that the extent to which regulation reasonably may go varies greatly with different classes of business and is not a matter of legislative discretion solely, but is a judicial question to be determined with due regard to the rights of the owner and employees."

In 1927 this court rendered its opinion in the case of *Tyson & Bro.* v. *Banton*, 273 U. S. 418, wherein it condemned as unconstitutional a statute of the State of New York which forbade the resale by brokers of any theatre ticket at a price in excess of 50 cents above the price printed thereon. Again the court reviewed the authori-

ties, including the fire insurance decision, and said, page 434:

> "*German Alliance Insurance Company* v. *Kansas*, 233 U. S. 389, carried the doctrine further and marks the extreme limit to which this court thus far has gone in sustaining price fixing legislation."

The opinion also emphasized the distinction between ordinary business regulation and legislative price-fixing and pointed out that to justify the latter there must be a broad and definite public interest.

After reviewing the cases the court said (p. 438):

> "From the foregoing review it will be seen that each of the decisions of this court upholding governmental price regulation, aside from cases involving legislation to tide over temporary emergencies, has turned upon the existence of conditions, peculiar to the business under consideration, which bore such a substantial and definite relation to the public interest as to justify an indulgence of the legal fiction of a grant by the owner to the public of an interest in the use."

In the case of *Ribnik* v. *McBride*, 277 U. S. 350, the court condemned, as unconstitutional, a statute of the State of New Jersey which purported to vest in the Commissioner of Labor the power to regulate fees to be charged by an employment agency. The court conceded the right of the legislature to regulate employment exchanges by provisions for licensing and other regulations to meet specific abuses, but it held that employment exchanges were not affected with a public interest to an extent that permitted legislative regulation of rates. The court said (p. 356):

> "The business of securing employment for those seeking work and employees for those seeking workers is essentially that of a broker, that is, of an intermediary. While we do not undertake to say that there may not be a deeper concern on the part of the public in the business of an employment agency, that business does not differ in sub-

> stantial character from the business of a real estate broker, ship broker, merchandise broker or ticket broker. In the *Tyson* case, *supra*, we declared unconstitutional an act of the New York legislature which sought to fix the price at which theatre tickets should be sold by a ticket broker, and it is not easy to see how, without disregarding that decision, price-fixing legislation in respect of other brokers of like character can be upheld."

If the fees or compensation of a "ship broker," who, as we understand it, is merely an intermediary who negotiates transportation facilities or transportation contracts (9 *C. J.* 510), cannot be fixed, notwithstanding the fact that he is an intermediary for furnishing the service of common carriers, then it would seem to follow that the fees of an insurance agent, who merely negotiates insurance contracts, cannot be legislatively prescribed.

The court also said (p. 357):

> "An employment exchange is essentially a private business. True, it deals with the public, but so do the druggist, the butcher, the baker, the grocer, and the apartment or tenement house owner and the broker who acts as intermediary between such owner and his tenants. Of course, anything which substantially interferes with employment is a matter of public concern, but at the same time that interference with the procurement of food and housing and fuel are of public concern. The public is deeply interested in all these things. The welfare of its constituent members depends upon them. The interest of the public in the matter of employment is not different in quality or character from its interest in the other things enumerated; but in none of them is the interest that 'public interest' which the law contemplates as the basis for legislative price control. * * * Under the decisions of this Court it is no longer fairly open to question that, at least in the absence of a grave emergency, * * * the fixing of prices for food or clothing, of house rental or of wages to be paid, *whether minimum or maximum*, is beyond the legislative power. And we perceive no reason for applying a different

> rule in the case of legislation controlling prices to be paid for services rendered in securing a place for an employee or an employee for a place."

As we read this last quotation it declares against legislative price-fixing of maximum or minimum wages in all private activities in the absence of a grave emergency.

The case of *Tagg Bros. & Moorhead* v. *U. S.* (*supra*) upheld the constitutionality of certain provisions of the Packers and Stockyards Act empowering the Secretary of Agriculture to fix just and reasonable charges for services rendered by persons engaged in the business of buying or selling, in interstate commerce, livestock at stockyards on a commission basis. The claim was made by these so-called "market agencies" that they furnished merely personal services and that there was no constitutional power to regulate the compensation to be paid for personal services. It was contended that "this rate fixing is in essence wage fixing." The court repelled the contention that the *Tyson* and *Ribnik* cases held that charges for personal services could not be regulated and pointed out that the question in those cases was whether those businesses were affected with a public interest.

The court said:

> "There is nothing in the nature of monopolistic personal services which makes it impossible to fix reasonable charges to be made therefor; and there is nothing in the Constitution which limits the Government's power of regulation to businesses which employ substantial capital. This court did not hold in Tyson & Bro. v. Banton and Ribnik v. McBride that charges for personal services cannot be regulated. The question upon which this court divided in those cases was whether the services there sought to be regulated were then affected with a public interest. Whether a business is of that class depends, not upon the amount of capital it employs, but upon the character of the service to which those who are conducting it engage to render.

> Plaintiffs perform an indispensable service in the interstate commerce in live stock. They enjoy a substantial monopoly at the Omaha stockyards. They had eliminated rate competition and had substituted therefor rates fixed by agreement among themselves, without consulting the shippers and others who pay the rates. They had bound themselves to maintain uniform charges regardless of the differences in experience, skill and industry.
>
> The purpose of the regulation attacked is to prevent their service from thus becoming an undue burden upon, and obstruction of, that commerce."

In other words, following *Stafford* v. *Wallace*, 258 U. S. 495, 516, and *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 41, these marketing agencies were held to be agencies of commerce and impressed with a public interest so that the charges they made to the public could be regulated. This regulation, to use the language in the *Wolff Packing Co.* case, dealt with "the feature which touched the public." It was like regulating insurance rates, but was not concerned with the regulation of salaries, fees or commissions within the internal organization of the market agencies.

We submit upon the basis of the body of law developed under these decisions that there is no legislative power to deprive employer or employee of the right to agree upon the amount of compensation for personal services.

In the case of *Northwestern National Insurance Co.* v. *Fishback*, 130 Wash. 490, 228 Pac. 516, the court considered a state statute forbidding any insurance company in cities of 50,000 or less to have more than one agent and more than two agents in larger cities, and held such requirement to be a violation of the Fourteenth Amendment. In its opinion the court said:

> "It has been held that the business of writing insurance may be regulated. *German Alliance Insurance Co.* v. *Lewis*, supra. But the contract of the agent with the company is not a contract which affects the public generally as does the business of

> insurance. The right to regulate the insurance business was sustained only as to those matters which affect the general public, and the general public is not concerned with the number of agents which the insurance company may employ."

Attention is also invited to the remarks of the District Court in *Niagara Fire Ins. Co.* v. *Cornell*, 110 Fed. 816, at p. 821, notwithstanding the fact that this court subsequently reached another conclusion on the ultimate question there presented (*Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401).

In the case of *O'Neil* v. *Providence Amusement Co.*, 42 R. I. 479, 108 Atl. 887, the court had before it a statute which required every theatre to employ a fireman at a specified wage during all times when the audience was present and not to discharge the employee without prior approval of the Board of Fire Commissioners. This provision was held to be unconstitutional in an extensive opinion in which the court said:

> "Reference however may be made to *Adair* v. *U. S.*, 208 U. S. 167, and *Coppage* v. *Kansas*, 236 U. S. 1, which sustain the proposition that while the duties of the person so employed may have to do with the public safety, his employment remains a private relationship in its legal and constitutional aspects."

In *Northwestern Bell Tel. Co.* v. *Spillman*, 6 F. (2d) 663, the court held (p. 665) that:

> "The officers of the plaintiff must be allowed to exercise business judgment in deciding what employees are necessary to the conduct of the business and what is a reasonable compensation for them."

The regulation here imposed constitutes complete destruction of freedom of contract within the field covered. All such contractual relations would be brought under

judicial review, for no company would dare voluntarily to pay the agent lest it might erroneously determine what is legally reasonable and thus incur the statutory penalties.

B.

The power to regulate rates to be charged the public does not imply power to invade the field of private management.

Approaching this problem from a slightly different angle, attention is invited to a line of decisions of this court holding that the power to regulate rates does not include the power to override the discretion of the corporate officers in matters of private management and the rate-making body may not even refuse to give full force to expenses and charges incurred by the management unless there is shown "an abuse of discretion in that respect by the corporate officers." The fact that the business of a company is impressed with a public interest does not subject its internal administration to legislative control.

United Gas Co. v. *R. R. Com.*, 278 U. S. 300, 320.
Banton v. *Belt Line*, 268 U. S. 413, 421.
S. W. Telephone Co. v. *Public Service Commission*, 262 U. S. 276, 289.
Wolff Packing Co. v. *Industrial Court*, 262 U. S. 522, 539.
Chicago, Milwaukee & St. Paul R. R. v. *Wisconsin*, 238 U. S. 491-501.
I. C. C. v. *Chicago-Great Western Ry. Co.*, 209 U. S. 108.
Lake Shore etc. Ry. Co. v. *Smith*, 173 U. S. 684, 691.

It seems, moreover, that a company must be allowed to work out its own internal adjustment as to the way in which it will comply with an order in the public interest.

Great Northern Ry. v. *Minn.*, 238 U. S. 340.

In the case of *Havre De Grace & Perryville Bridge Co.* v. *Towers et al.*, 132 Md. 16, 103 Atl. 319, a question arose over an order of the Public Service Commission of Maryland reducing the rates of toll by a bridge company. In the course of the opinion the court held that the Commission lacked authority to prescribe a limit of salaries to be paid to the officials of the bridge company. The court says (p. 23):

> "It is true that the opinion does not say that these officers shall not receive any greater compensation than that referred to in the opinion, but intimates that if a higher compensation is paid to them, it cannot be regarded as a proper charge against the receipts of the bridge company, but should be paid apparently by the individual stockholders. Inasmuch as the services for which the salaries are paid are to be rendered to the corporation, as a corporation, it is hard to understand why the salaries for the performance of the services should not be paid by the corporation. Indirectly, of course, the question of salaries enters into the question of rate making, since the larger the aggregate amount of salaries paid, the less will be the net revenue derived from tolls, applicable to dividends for the stockholders. Therefore, in this regard, the Public Service Commission by its order undertook by indirection the financial management of the company.
>
> It is not intended in what has been said to intimate that under no circumstances have the Public Service Commission the right to treat an allowance of salary as an improper charge by the corporation; undoubtedly where there has been a flagrant abuse of such power the Public Service Commission may intervene, but the record in this case is entirely devoid of anything to show that the power of the directors to fix the salaries of the officers of the company has been in any way abused. In this regard, therefore, the effect of the order of the Commission is undoubtedly to interfere with the financial management of the company, and what was said with regard to the main depreciation reserve account is equally applicable here."

In *Importers and Exporters* v. *Rhoades*, 239 N. Y. 420, 426, the court in a dictum questioned the power of the Legislature to interfere with the right of the insurance company to fix the amount of commissions to be paid agents, and said:

> "If we assume that the Legislature, if it had seen fit to do so, might have included in its grant of power to regulate rates the further power as a condition of service to regulate agents' and brokers' commissions, the next logical step would be to include, limit and regulate as factors in rate making all expenses of the insurance companies, such as salaries and office expenses. The question would then arise whether such a delegation of legislative power was for the benefit and protection of the public (German Alliance Ins. Co. v. Lewis, 233 U. S. 389) or whether it interfered with the right of fire insurance companies to regulate their own business in regard to agents' and brokers' commissions, and the number of agencies they should establish, and other matters of internal management—a question which we need not consider at this time."

C.

The New Jersey statute is arbitrary and unnecessary, because the declared purpose of promoting reasonable insurance rates can be accomplished by the simple and direct means of rate regulation, and is not in fact promoted by regulating the compensation of insurance agents.

In order to sustain the statute in question it must appear that it is something other than an arbitrary interference with liberty and that the restriction adopted actually has some reasonable connection with some legitimate end which it purports to promote.

Whatever may have been the real motive behind the enactment of this restriction on personal service contracts, it seems certain that the declared purpose of promoting reasonable insurance rates could not have been the real purpose.

While the New Jersey Insurance Laws are voluminous and there was the unquestionable power legislatively to fix reasonable insurance rates, no such power is exercised.

Chap. 128, Laws of New Jersey, approved March 29, 1928.

Chap. 85, Laws of New Jersey, approved March 8, 1913.

Chap. 134, Laws of New Jersey, approved April 3, 1902.

Interest in reasonable insurance rates for the public, or confidence in a legislative remedy to maintain such rates, is negatived by failure to exercise the constitutional power to fix rates. The phrase "reasonable rates" appeared in the statute for the first time in the Amendment of 1928 and then only in describing the ostensible purpose of regulating the compensation of insurance agents. The statute does not even contain a direct declaration of policy that insurance rates shall be reasonable. Without attempting to provide for reasonable rates which could have been done directly, and without any showing that commissions have jeopardized reasonable rates, the state unnecessarily restricts liberty and encroaches on private management in radical respects, for some alleged remote and shadowy effects that such action might have upon insurance rates. We submit that the decisions of this court have repeatedly declared that liberty of contract cannot be so arbitrarily and unnecessarily interfered with under the guise of protecting the public.

In the case of *Jay Burns Baking Co.* v. *Bryan*, 264 U. S. 504, this court had before it a statute of the State of Nebraska, prescribing the minimum weight of loaves of bread, and in order to prevent palming off of smaller loaves for larger ones, also fixed a maximum weight for each class, the weights to be determined by averaging loaves of each class in lots of twenty-five. The plaintiff-in-error conceded the power of the state to prevent the sale of

loaves of less than the purported weight, but contended that the provision fixing maximum weights was void. The question therefore arose as to whether or not the provision relative to maximum weights was substantially connected with the purpose of preventing short weight sales. This court pointed out that (p. 517) "Imposition through short weights readily could have been dealt with in a direct and effective way," and that the restrictions, therefore, were unnecessary to accomplish that end. The court said (p. 513):

> "Undoubtedly, the police power of the State may be exerted to protect the purchasers from imposition by sale of short weight loaves. *Schmidinger* v. *Chicago*, 226 U. S. 578, 588. Many laws have been passed for that purpose. But a State may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."

Liggett Co. v. *Baldridge*, 278 U. S. 105, reaffirmed the doctrine of the *Burns Baking* case. In that case, a Pennsylvania statute required that every stockholder of a drug store should be a licensed pharmacist, and the question was whether this had any reasonable or substantial connection with the public health. The court pointed to legislation showing that the external contacts of a drug store with the public were safeguarded, and said (p. 113):

> "Thus it would seem every point at which the public health is likely to be injuriously affected by the act of the owner in buying, compounding, or selling drugs and medicines is amply safeguarded. * * * In the light of the various requirements of the Pennsylvania statutes, it is made clear, if it were otherwise doubtful, that mere stock ownership in a corporation owning and operating a drug store, can have no real or substantial relation to the public health; and that the act in question creates an unreasonable and unnecessary restriction upon private business. No facts were presented by the record, and so far as appears, none were presented to the

> legislature which enacted the statute, that properly could give rise to a different conclusion."

The court referred to the existence of chain drug stores whose shares of stock were sold on the various exchanges of the country, so that they were held by many persons not registered pharmacists, and said (p. 114):

> "If detriment to the public health thereby has resulted or is threatened, some evidence of it ought to be forthcoming. None has been produced, and so far as we are informed either by the record or outside of it, none exists."

These two cases support the contention that "*unnecessary restrictions*" cannot be imposed on business, particularly where there are simple, direct and adequate constitutional means of protecting the public in respect to the very matter which the challenged statute purports to promote. Thus, the unnecessary regulation of the internal management of an insurance company, in order to protect the public as to the reasonableness of insurance rates, is void, in view of the constitutional right of the legislature to protect the public directly by fixing insurance rates.

In the case of *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1, page 11, the court said:

> "But all those cases recognize the duty of the court to inquire into the real effect of any statute duly challenged because of interference with freedom of contract guaranteed by the Fourteenth Amendment, and to declare it invalid when without substantial relation to some evil within the power of the State to suppress and a clear infringement of private rights."

Again in the same case, at page 9, the court said:

> "The real question comes to this—May the State, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business

> in the usual way heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents? Former decisions here require a negative answer. We think the inhibition of the statute has no reasonable relation to the anticipated evil—high bidding by some with purpose to monopolize or destroy competition. Looking through form to substance, it clearly and unmistakably infringes private rights whose exercise does not ordinarily produce evil consequences, but the reverse."

In the case of *Meyer* v. *Nebraska*, 262 U. S. 390, 399-400, this court said:

> "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts."

See also:

Chicago, B. & O. R. R. v. *McGuire*, 219 U. S. 549, 569.
Seattle Trust Co. v. *Roberge*, 278 U. S. 116, 121.
McLean v. *Arkansas*, 211 U. S. 538.
Lawton v. *Steele*, 152 U. S. 133.
Lochner v. *N. Y.*, 198 U. S. 45.

In the case of *Adair* v. *U. S.*, 208 U. S. 161, this court considered a federal statute forbidding discharge of a railroad employee on the ground that he was a member of a labor union and held that the enactment did not come within the power to regulate commerce. The court (p. 178) said:

> "Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate

> commerce among the States must have some real or substantial relation to or connection with the commerce regulated."

The query naturally presents itself that if a regulation of the relation of an employer and employee having to do with the operation of railroads cannot be deemed a regulation of commerce except so far as necessary to secure continuity of transportation, then how can it be said that a regulation controlling contracts between an insurance corporation and its employees is in fact a regulation of insurance rates or of the relation between the insurance company and the public which is the only subject-matter over which legislative power of this character can be exercised?

While it must be conceded that the legislature has the right to regulate the rates to be charged to the public, it does not follow therefrom that the detail cost of administration may be fixed and regulated by the government and the management of such business thus largely assumed by the government. If it be only necessary in order to sustain an act of this character to show that it regulates one of the items of cost entering into the rendition of service to the public, then there is no detail of the business from the salary of the president to the wages of the charwoman, and the sufficiency of the services rendered by each, as well as the price of rent to the price of paper clips, which may not become the ultimate subject of legislative control.

If, through some circumstances not appearing in this case, a rate-fixing body encountered charges which were so flagrantly wasteful and exorbitant that they were beyond the discretion of management, it could disallow those excesses in computing a reasonable rate (*S. W. Tel. Co.* v. *Public Service Com.*, 262 U. S. 277, 289; *Havre De Grace & Perryville Bridge Co.* v. *Towers et al.*, 132 Md. 16, 103 Atl. 319). In such an event, private persons in private business would, nevertheless, be free to adjust their business by private contracts to meet the regulations of the rate-fixing

body. Such a line of argument does not tend to prove that the public has an interest in limiting the salaries paid in private management, but that the regulation of external relations through rate-fixing commissions is adequate to protect the public against wasteful charges without encroaching upon the private right of conducting business.

If it be answered that wasteful charges with fixed rates might endanger the solvency of the company, the reply is that such matters can be directly regulated (*Noble State Bank* v. *Haskell*, 219 U. S. 104) without interfering with the liberty of the company to make its own internal adjustments.

The very peculiarities of the statute, moreover, show that it is not designed to promote its avowed purpose of securing reasonable insurance rates. It not only forbids the company from paying any agent in excess of a reasonable amount, but also forbids compensation to any agent in excess of that paid by it to any other agent within the state. If the company is convicted of violating the statute by paying some agent in excess of others, it may then be required to pay that excess to all other agents. Thus, in case of violations, the company is required to make the excess payments which it is forbidden voluntarily to make. If the Act had been designed to protect the revenues of the company, it would not thus have sought to deplete them, but would have forbidden the agents to receive excess commissions, and in case of violations, would have required the agents to make restoration.

The prohibition against paying efficient agents in excess of compensation paid to the most inefficient agent, as we will show under Point III, not only does not protect reasonable rates but is positively injurious to the insurance business and the public interest therein. To limit the compensation of an insurance agent of indispensable value who operates with an expensive overhead in the City of Newark to that of a small agent in a country town who conducts his insurance business (perhaps in his residence or with mere desk room, or as an incident to a real estate

business or law practice) is in the long run an economic impossibility. To comply with the statute the company must either lose such valuable agencies as the appellant and thus allow its business to suffer from inefficient representation, or it must dispense with the small town agent in order adequately to pay appellant. In either event the insurance business will be injured by its inability to pay competent talent what it is reasonably worth and it cannot be said that the statute has the slightest tendency to protect the public against unreasonable insurance rates.

This interference with liberty and property is therefore not justified by the declared purpose of safeguarding the reasonableness of insurance rates. The connection between the means and the end is too speculative and theoretical to justify such a forfeiture of human rights. Freedom of contract cannot be gratuitously encroached upon under the guise of serving the public interest, particularly when it appears that the statute does not tend to serve the declared public purpose, and that there is an obvious, direct, logical and effective means of protecting the public without such encroachment. If there is any set of circumstances under which a legislature can prevent an individual from receiving reasonable or agreed compensation for his personal services, it certainly does not appear in connection with this case.

To sustain such a far-reaching interference with liberty and private management as is projected by the New Jersey statute, no "exceptional circumstances" have been advanced to show any direct public interest in the amount of compensation to be paid by a fire insurance company to its agents. That internal relationship between company and agent is one of private management and is not a relationship with which the public is concerned to the extent of justifying legislation fixing the salaries of employees. The public interest in reasonable rates can be directly protected by rate-fixing legislation without an attempt to destroy liberty of contract within the internal organization of the insurance business. For this reason, the very fact that rates may be regulated, is in itself an

argument against the need or existence of legislative power to encroach upon private management. If internal adjustments are necessary in order to comply with the requirements of orders in the public interest, the company should be left free to select its own manner of adjustment.

POINT II.

Assuming legislative power to regulate the compensation of fire insurance agents, the regulation in this case is an arbitrary and unconstitutional exercise of such power.

The further difficulty with the present statute, assuming that the power to regulate the compensation of insurance agents exists, lies in the double provision which forbids the payment of any compensation *in excess of a reasonable amount or in excess of that paid to any other agent.* Regardless of what his services are worth, each agent is not to receive more than what is reasonable for any other agent to receive—the lowest *quantum meruit* controls even though it means, as with this appellant, far less than reasonable payment. The statute prescribes uniformity of compensation based upon what is not in excess of reasonable compensation to the least valuable. That is the only standard permitted, because any higher standard would result in the agent whose services are worth the least being paid in excess of the reasonable value of his services. The most valuable—even the mediocre—must be underpaid because the requirements prevent his receiving more than what is reasonable for the least valuable agent.

An agency in a small town is conducted differently from a metropolitan agency, and between the two there is great variation in efficiency and in selling costs, overhead costs and wages due to varying rents and living expenses.

Agencies in small towns are usually carried on as an incident to a real estate business or law practice; some-

times in a private residence or in an office with merely desk room. Agencies in the city are usually conducted as a business by themselves in extensive offices. In the one case, the agent requires but little training, while in the other he is a specialist. Unlike the small town agents, the city agencies utilize brokers and solicitors to maintain their volume of business and share commissions with them.

The services of some agents, particularly in large cities, are so valuable that they are much sought after through the competition of insurance companies, with the result that they can command a higher return than others. The rate of compensation reasonable for the less important type of agency is obviously inadequate to enlist the highest class agency, sharing commissions with brokers.

Competitive conditions in one community will compel an insurance company to consider the rates of commission or compensation offered to first-class agencies by competing companies. Under the statute the company must elect whether to meet the competitive rates, and like its competitors confine itself to highly paid agencies, or in the alternative to surrender the first-class agencies and confine itself to small town agents and inferior city agents. It cannot meet the uniformity provision of the law by raising the compensation of the inferior agents, as that would be paying them in excess of what is reasonable.

The point is well illustrated by the pleadings in the suit brought against the Hartford Fire Insurance Company wherein it is alleged and admitted that there was an agreement to pay the reasonable value of the services and that said services were in fact reasonably worth 25 per cent. of the premiums produced. The answer to this claim in effect says that the company cannot pay what the services were reasonably worth and which it was agreed should be paid for them, because, forsooth, the company is paying less than that to several other agents. Thus, by arbitrary fiat this statute in the pretended interest of securing reasonable insurance rates provides that no fire insurance company in the State of New Jersey, in employing agents, shall give monetary recognition to varying human capacity

and ability and the varying expenses of living and conducting business in different localities.

One hardly needs to cite authorities to condemn this arbitrary denial of the right of men to pay and receive in accordance with the agreed or reasonable value of services rendered. The arbitrary fiat of economic equality is the goal of socialism and the antithesis of our individualism. In this case the socialistic equality is not based on the average value of men's services but upon the value of the services of those on the lowest level.

In the case of *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1, this court had before it the statute of Minnesota forbidding any concern engaged in buying milk, cream, etc., for sale or manufacture from purchasing such commodities at a higher price in one locality than it paid in another locality after due allowance for cost of transportation, etc. In that case, the court said (p. 8):

> "It seems plain enough that the real evil supposed to threaten the cream business was payment of excessive prices by powerful buyers for the purpose of destroying competition. To prevent this the statute undertook to require every buyer to adhere to a uniform price fixed by a single transaction.
>
> As the inhibition of the statute applies irrespective of motive, we have an obvious attempt to destroy plaintiff in error's liberty to enter into normal contracts long regarded not only as essential to the freedom of trade and commerce but also as beneficial to the public. Buyers in competitive markets must accommodate their bids to prices offered by others, and the payment of different prices at different places is the ordinary consequent. Enforcement of the statute would amount to fixing the price at which plaintiff in error may buy, since one purchase would establish this for all points without regard to ordinary trade conditions."

See also *Williams* v. *Standard Oil Co.*, 278 U. S. 235, p. 244.

Assuming, for the purpose of this point of our brief, that there is some legislative power to regulate the compensation of insurance agents under certain circumstances, we submit that the provision forbidding the payment by any company to anyone of its agents, however valuable, of any compensation in excess of what would be reasonable compensation for the least efficient and least valuable agent, is arbitrary and unnecessary and injurious to both public and private interests. It prevents a company which desires to do business with all classes of agents in the state from meeting the competition of other companies, which, by limiting themselves to the most valuable agents, preserve their liberty adequately to compensate such valuable agents. It takes the property of appellant and those similarly situated by preventing the recovery of the reasonable or agreed value of services rendered.

The workman is not to be worthy of his hire, because the smaller rate of compensation to others, who may be less valuable, operates as a millstone to hold him down. Can any statute be constitutional which decrees that some men shall be underpaid, because of the wage-earning limitations of less capable men? Such a proposal conflicts with the most fundamental concepts of our system of constitutional rights.

POINT III.

The statute is void for indefiniteness.

The statute urged as a defense in this case is a penal law. By its terms, any company may be penalized by a fine of $500 in every instance where it pays an agent "in excess of a reasonable amount." After conviction for violation of the penal provisions, other local agents may recover excess commissions from the company. As already pointed out, no company could safely make payments to any agent without first securing a judicial review to apply

the indefinite standard of "a reasonable amount." There is no ascertainable standard of legality and illegality.

It is these indefinite penal provisions which operated as a bar to recovery in this case. The defendants did not dare make payment of the balance due because, as their answer alleges, it was "unlawful" to do so. The penal provisions operated *in terrorem* to coerce non-payment.

Such a statute, we submit, is void for indefiniteness, and, therefore, cannot operate as a defense.

U. S. v. *Cohen Grocery Co.*, 255 U. S. 81, p. 89.
Connally v. *General Construction Co.*, 269 U. S. 385, p. 390.
Cline v. *Frink Dairy Co.*, 274 U. S. 445, p. 453.

CONCLUSION.

We submit that the New Jersey courts erred in upholding the constitutionality of the statute in question. The legislative power to pass regulatory laws in the public interest does not extend to the administrative details of private management having no connection with the public interest. In judicial parlance, the legislature lacks jurisdiction of the subject-matter. Moreover, the statute is void because of its arbitrary provisions attempting to establish uniform compensation and to base penalties upon vague and indefinite standards.

Respectfully submitted,

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APPENDIX.

Full text of Chapter 128 of the Laws of 1928. It amended previous statute of 1913 only by adding italicized matter.

CHAPTER 128, LAWS 1928, PAGE 257:

An Act to amend an act entitled "A further supplement to an act entitled 'An act to provide for the regulation and incorporation of insurance companies and to regulate the transaction of insurance business in this State,' approved April third, one thousand nine hundred and two," which said supplement was approved March eighteenth, one thousand nine hundred and thirteen.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

Section 1 amended.

1. Section one of the act of which this act is amendatory be and the same is hereby amended so that the same shall read as follows:

Unfair discriminating rates forbidden.

1. No corporation, firm, association, individual or aggregation of individuals, hereinafter called "insurer," doing the business of insurance within this State shall fix or make any rate or schedule of rates, or charge, demand, collect or receive, directly or indirectly, or through any special rate, tariff, drawback, rebate, concession, device or subterfuge, a rate for insurance, which discriminates unfairly between risks within this State of essentially the same hazard, nor shall any insurer against the hazards of fire or legal liability of employers make any such insurance within this State except in accordance with general basis schedules, embodying basis rates, charges, credits, terms, conditions, permits, standards and other data necessary to the

Basis schedules filed.

computation of equitable rates and rules of practice for such insurance, which general basis schedules, embodying basis rates, charges, credits, terms, conditions, permits, standards and other data used for the determination of rates shall be filed by such insurer or its agent or expert duly authorized, with the Commissioner of Banking and Insurance within three months after this act goes into effect, or with the amendments to such general basis schedules which may be filed with the Commissioner of Banking and Insurance from time to time thereafter. Any one or more of such insurers singly or jointly may employ for the making of such general basis schedules and rates and the filing of the same the services of such experts as it, or they, may deem advisable for such purpose. *In order that rates for insurance against the hazards of fire shall be reasonable it shall be unlawful for any such insurer licensed in this State to directly or indirectly pay or allow, or offer or agree to allow, any commission or other compensation or anything of value, in excess of a reasonable amount, to any person for acting as its agent in respect to any class of such insurance, nor to directly or indirectly pay or allow, or offer or agree to allow, any commission or other compensation or anything of value, to any person for acting as its local agent in respect to any class of such insurance, in excess of that offered, paid or allowed to any one of its local agents on such risks in this State. On the written complaint of any insurer or any agent licensed in this State, that there has been any violation of the provisions of this act, or when the commissioner deems it necessary without such complaint, the commissioner shall inquire whether or not there has been any violation of the provisions of this act in the commissions paid or payable on such risks in this State.*

Joint use of schedules.

Reasonable rates maintained.

On complaint commissioner to make inquiry.

Insurer to furnish information on demand.

Every such insurer or agent shall, within ten days after written demand therefor, furnish to any person, upon whose property or risk a rate has been made by said insurer, or to his authorized representative, full information as to such rate, and if such property or risk be rated by schedule applying particularly to each risk, a copy of such schedule, and shall provide such means as may be approved by the Commissioner of Banking and Insurance whereby any person or persons affected by such rate may be heard on an application for a change in such rate. Whenever it is made to appear to the satisfaction of the Commissioner of Banking and Insurance that any such rate or general basis schedule or amendment thereof discriminates unfairly between risks within this State of essentially the same hazard or that any insurer has made any insurance within this State at any rate not in accordance with the general basis schedule or amendment thereof filed by it, he may, after a full hearing, either before himself or before any salaried employee of the Department of Banking and Insurance whose report he may adopt, order such discrimination removed, or such rate corrected in accordance with such general basis schedule or amendment thereof; and all such insurers affected thereby shall forthwith comply with such order; nor shall such insurers or any of them remove such discrimination by increasing the rates on any risk or class of risks affected by such order unless it is made to appear to the satisfaction of the Commissioner of Banking and Insurance that such increase is justifiable.

Correction of unfair rates.

Compliance with order.

Exceptions to act.

This supplement shall not apply to any contract of life insurance, nor to any contract of insurance upon or in conection with marine or transportation risks or hazards other than contracts for automobile insurance, nor to contracts of insurance upon property or risks located without this State, nor to contracts of title insurance or mortgage guar-

2. Section two of the act of which this act is amendatory be and the same is hereby amended so that the same shall read as follows: Section 2 amended.

2. Any insurer, agent, expert, person or corporation violating any of the provisions of this act shall be subject to a penalty of five hundred dollars for each and every violation to be sued for and recovered by the Commissioner of Banking and Insurance, or by any citizen of this State and paid to the State Treasurer. *In case any insurer is convicted of a violation of this act, every local agent of the insurer in this State shall be entitled to the same commission or compensation, or other thing of value, for business done for the insurer during the calendar year in which the discrimination took place, on risks in this State, and any local agent may recover from the insurer in any court of competent jurisdiction, the amount of such excess commission or compensation, or other thing of value, if any, to which he may become entitled under the provisions of this act.* Penalty. Agents entitled to commission. Agent may recover excess commission.

If any section, provisions or part of this act be questioned in any court of competent jurisdiction, and declared to be unconstitutional, the said section, clause or part shall be exscinded and the remainder of the act shall continue in full force and effect. As to constitutionality of act.

3. *This act shall take effect immediately.*

Passed March 29, 1928.